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In the

Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARK,
Petitioners,

v.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; JAIME GUTIERREZ; and ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has nearly 25,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned

citizens, many of whom are lawyers. PLF's Board of Trustees evaluates the merits of any contemplated action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases concerning First Amendment issues. For example, PLF participated as amicus curiae in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1991), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. ____, 132 L. Ed. 2d 700 (1995), and PLF attorneys, representing petitioners, argued successfully before this Court in *Keller v. State Bar of California*, 496 U.S. 1 (1990).

Amicus seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience dealing with the First Amendment will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Rule 37.2, written permission from all parties for PLF to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

This case comes to this Court out of a 6-5 *en banc* decision rendered by the Ninth Circuit Court of Appeals, which declared that an Article of the Constitution of the State of Arizona entitled "English as the Official Language" violated the First Amendment rights of a state employee, Maria-Kelley Yniguez. The Article requires that "[t]his State and all political subdivisions of this State shall act in English

and in no other language." Art. XXVIII, § 3(1)(a). Ms. Yniguez is fluent in both Spanish and English. After passage of the initiative making Article XXVIII a part of the State Constitution, she ceased using Spanish in the course of her job with the Arizona Department of Administration, where she was hired to process insurance claims against the state. Previously, Ms. Yniguez had spoken in Spanish to the Spanish-speaking members of the public with whom she dealt. Ms. Yniguez also desired to execute claim settlements in Spanish, so that Spanish-speaking claimants could read them. Ms. Yniguez' supervisor does not read or speak Spanish.

Ms. Yniguez' brought this present action in federal District Court against the State of Arizona, then-Governor Mofford, the Arizona Attorney General, and the Director of the Department of Administration, alleging a violation of her right to free speech under the First Amendment to the Constitution of the United States. At no time had defendants sought enforcement of Article XXVIII against Ms. Yniguez. Rather, Ms. Yniguez sought declaratory and injunctive relief on the basis that Article XXVIII was facially overbroad. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 925 (1995).

On jurisdictional grounds, all defendants to the action were dismissed except for Governor Mofford. *Id.* After plaintiff prevailed, Arizonans for Official English sought intervention as defendants and appellants when Governor Mofford chose not to appeal. *Id.* at 926. Arizona's Attorney General also intervened at the Ninth Circuit for the limited purpose of arguing the constitutionality of Article XXVIII. *Id.* Although defendant Mofford and, later, the Attorney General, pointed out that the interpretation of Article XXVIII had not been ascertained by a controlling state appellate court, both the District Court and the Ninth

Circuit denied defendants' motions for abstention and certification to Arizona state court on the premise that the Article was "not susceptible of a narrowing construction" distinct from the federal court's interpretation. *Id.*

After finding its exercise of jurisdiction appropriate, the Ninth Circuit upheld the District Court's decision that Article XXVIII violated the First Amendment. It determined that plaintiff's decision to speak Spanish, in the context of conveying information from the state to the public, constituted speech of "public concern" entitled to First Amendment protection, *id.* at 940, and that Arizona's countervailing interest in "protecting democracy by encouraging 'unity and political stability;' [and] encouraging a common language," *id.* at 944, were not sufficiently important, nor sufficiently served by the Article's implementation, to outweigh plaintiff's First Amendment rights.

SUMMARY OF ARGUMENT

Despite the Ninth Circuit's assertion that Article XXVIII's plain language states the broadest possible proscription against the use of any language other than English, the Article is sufficiently ambiguous, even accepting a plain language interpretation, that the Ninth Circuit should have refrained from exercising jurisdiction until a controlling state court had interpreted the Article under Arizona state law. Because the Article's own definitional section leaves sufficient room to address the First Amendment concerns raised by the Ninth Circuit, issuing the decision was both premature and unwarranted.

Further, even if the Ninth Circuit's interpretation of Article XXVIII is accurate, plaintiff's desire to speak Spanish to members of the public while engaged as a state employee in the conduct of state business is not a speech interest entitled to First Amendment protection. This Court has qualified public employee free speech rights with certain requirements, among them that the speech be made by the employee as a citizen, that the speech address a matter of public concern, and that the employee's free speech rights outweigh the state's countervailing interest in applying its policy. Although the Ninth Circuit attempts to leverage plaintiff's argument into established precedents, plaintiff's position is not analogous to cases previously addressed by this Court for a number of reasons, not the least of which is that the state restriction at issue here is a ban on the choice of language spoken, not the specific import of the words.

Because plaintiff does not meet this Court's previously enunciated requirements to establish that her own or others' First Amendment rights were chilled by implementation of Article XXVIII, this Court should grant petitioner's writ of certiorari to address the broad expansion of First Amendment protections created by the Ninth Circuit's line of reasoning.

ARGUMENT

I

BECAUSE ARTICLE XXVIII IS CAPABLE OF AN ALTERNATIVE CONSTRUCTION, ABSTENTION BY THE NINTH CIRCUIT IS PROPER IN THIS CASE

Petitioners raise separately the issues of statutory interpretation and federalism. Petition for Writ of Certiorari at 20-22. Because that portion of the Ninth Circuit's opinion

dealing with the statutory construction of Article XXVIII establishes that court's grounds for declining to abstain, amicus believes that the propriety of abstention, based purely on the question of statutory construction, is fairly included in the petition for writ of certiorari. Because it is a state constitution that is being construed, amicus believes that the question of abstention and certification to state court presents a unique and significant federalism issue in the present case, and urges this Court to address it directly.

The doctrine of abstention is based upon the principle that federal courts should respect the competence of state courts to construe their own statutes consistently with the requirements of the federal Constitution. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). While the relative importance of First Amendment considerations dictate that abstention should be exercised cautiously in cases raising free speech issues, *Zwickler v. Koota*, 389 U.S. 241 (1967), where a question concerns the constitutionality of a state law, federal courts should abstain if the state law is uncertain or unsettled, or where the state law may be interpreted in such a way as to materially alter the federal constitutional question. *Procunier v. Martinez*, 416 U.S. 396 (1974). In this case, while the Ninth Circuit gave consideration to these federalism principles, *Yniguez*, 69 F.3d at 930, it erroneously concluded that the state law at issue, Article XXVIII, was not capable of an alternative construction which would have materially altered the federal constitutional question before it.

In interpreting Article XXVIII, the Ninth Circuit placed primary emphasis upon Section 3(1)(a), which provides that "[t]his State and all political subdivisions of this State shall act in English and no other language." In

construing this provision, the Ninth Circuit expressed its agreement with the District Court that "[t]he article's plain language broadly prohibits all government officials and employees from speaking languages other than English in performing their official duties, save to the extent that the use of non-English languages is permitted pursuant to the provision's narrow exceptions section." *Yniguez*, 69 F.3d at 931.

By its terms, Article XXVIII's broad proscriptions apply to:

> (i) the legislative, executive and judicial branches of government,
>
> (ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities,
>
> (iii) all statutes, ordinances, rules, orders, programs and policies,
>
> (iv) all government officials and employees during the performance of government business.

Section 1(3)(a). Because of this seemingly all-encompassing language, the Ninth Circuit determined that

> [e]ven a cursory reading of Article XXVIII demonstrates that the provision is an integrated whole that seeks to achieve a specific result: to prohibit the use in oral and written

> communications by persons connected with the government of all words and phrases in any language other than English.

Yniguez, 69 F.3d at 933. Unfortunately, it appears that the majority of the Ninth Circuit performed only just such a "cursory reading." Article XXVIII does not, on its face, employ such a sweeping proscription.

In rejecting the Arizona Attorney General's opinion, which attempted to limit the Article's coverage to only "official" acts rather than all acts of state employees, the Ninth Circuit applied a "plain language" standard to the Article. *Id.* at 929. However, in not finding the Attorney General's interpretation persuasive, the majority failed to appreciate that its own interpretation was not the only conceivable "plain language" interpretation. Specifically, Section 1, which describes to whom the Article applies (see above), *qualifies* its coverage in subsection (3)(b): "As used in this Article, the phrase '[t]his state and all political subdivisions of this State' shall include every entity, person, action or item described in this Section, *as appropriate to the circumstances*." (Emphasis added.)

While Arizona courts could still construe Article XXVIII as strictly as the Ninth Circuit, the First Amendment concerns raised by the Ninth Circuit could have been avoided by an alternative interpretation through application of that phrase. Rather than read the phrase "as appropriate to the circumstances" as implying some reasonable limitations upon the English-only provision of Article XXVIII, however, the Ninth Circuit chose instead to ignore its implications entirely, necessarily leading the majority to envision the absurd:

> The article effectively requires that [bilingual] employees remain mute before members of the non-English speaking public who seek their assistance. At such moments of awkward silence between government employees and those they serve, it will be strikingly clear to all concerned that vital speech that individuals desire both to provide and to hear has been stifled by the state.

Id. at 942. It is eminently possible that Arizona state courts could avoid such concerns by finding that speaking a non-English language is "appropriate" in a host of situations, including, quite obviously, situations where speaking English is of absolutely no communicative value.

Further, contrary to the majority's claim that Article XXVIII is intended to "prohibit the use in *all oral and written communications by persons connected with the government* of all words and phrases in any language other than English," *id.* at 933 (emphasis added) the act applies to "government officials and employees *during the performance of government business*." Section 1(3)(a)(iv) (emphasis added). Not all communications from and between government employees necessarily constitute "government business."

Lastly, the Ninth Circuit held Article XXVIII invalid in its entirety, on the basis that it is overbroad and contains no severability provision. *Id.* at 933-34. It is true that Article XXVIII contains no specific severability provision. However, Section 3(2) of Article XXVIII does provide exceptions to the application of its English-only requirements; among these is "(b) to comply with other federal laws." Under the majority's reading of Article XXVIII, the First Amendment to the Constitution of the

United States does not constitute one of the "federal law[s]" contained within this exception. While it may not be textually clear that the First Amendment is implied by the "federal law" exception, comity considerations would seem to militate in favor of abstention so that controlling Arizona state courts would at least be given the opportunity to define the parameters of the constitutional requirements inherent in their own state law.

While federal courts have wide discretion as to when they may choose to abstain from resolving a federal constitutional question,

> [w]here resolution of the federal constitutional question is dependent upon, or may materially be altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.

Harman v. Forssenius, 380 U.S. 528, 534 (1965) (citations omitted). This Court should grant the petition for certiorari to address whether the Ninth Circuit's exercise of jurisdiction and issuance of an opinion on the merits of respondent's claim is consistent with the federalism principles that would dictate abstention.

II

RESPONDENT'S USE OF A FOREIGN LANGUAGE IS NOT ENTITLED TO FIRST AMENDMENT PROTECTION

A. In Order to be Entitled to Protection Under the First Amendment, Respondent's Speech Must Meet the Requirements Enunciated by This Court Pertaining to Public Employees

Article XXVIII does not purport to ban the use of non-English languages by citizens throughout the State of Arizona. And, contrary to the statement by the Ninth Circuit, it does not even apply to all "persons connected with the government." *Yniguez*, 69 F.3d at 933. Rather, Article XXVIII's language restrictions apply only to state "officials and employees during the performance of government business." Section 1(3)(a)(iv). As such, the applicable First Amendment test, and the test that was applied by the Ninth Circuit in this case, is that applied by this Court pertaining to public employee speech.

This Court enunciated the standards by which government could regulate employee speech in *Pickering v. Board of Education of Township High School District*, 391 U.S. 563 (1968). That case dealt with whether a local school board had violated a teacher's First Amendment rights by discharging him based upon a letter he had sent to a local newspaper. This Court stated that

> it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The

> problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering, 391 U.S. at 568. The balancing test defined by *Pickering* has been applied consistently by this Court in public employee speech cases since. *See, for example, Connick v. Myers*, 461 U.S. 138 (1983), *Rankin v. McPherson*, 483 U.S. 378 (1987), *Waters v. Churchill*, 511 U.S. ____, 128 L. Ed. 2d 686 (1994), *United States v. National Treasury Employees Union*, 513 U.S. ____, 130 L. Ed. 2d 964 (1995). Therefore, in assessing the speech at issue in this case, relevant considerations include whether: (1) respondent is speaking as a citizen; (2) the speech relates to a matter of public concern; and (3) the state's interest as an employer is outweighed by respondent's interest in engaging in the restricted speech.

B. This Court Should Clarify That the Public Employee Speech Doctrine Does Not Apply Where the Employee Does Not Speak as a Citizen

The cases that have come before this Court under the category of public employee speech have uniformly related to restrictions on speech *not* part of the employee's official functions. In *Pickering*, the Court held this distinction to be significant

> in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher,

> we conclude that it is necessary to regard the teacher *as the member of the general public he seeks to be*.

391 U.S. at 574 (emphasis added). Likewise, speech restrictions disfavored by this Court have generally involved employee speech outside of the employee's official duties. ("When a public employee speaks ... as an employee upon matters only of personal interest ..., a federal court is not the appropriate forum in which to review the wisdom of a personnel decision." *Connick*, 461 U.S. at 147.)

In stark contrast, Article XXVIII's non-English restriction applies only where respondent is *not acting as a citizen*, but instead where she *represents only the state*. Indeed, Article XXVIII specifically excludes all of respondent's private speech and even speech between her co-workers when she is not engaged in "the performance of government business." Section 1(3)(a)(iv). Paradoxically, in the same section in which the Ninth Circuit majority avers that "the government would normally have the authority to determine the tasks that it asks its employees to perform and to dictate the content of the messages that it wishes its employees to communicate to the public," *Yniguez*, 69 F.3d at 940, the Ninth Circuit finds that the speech at issue is *more* entitled to First Amendment protection by virtue of the fact that "here the employee is not simply commenting on a public issue but in speaking *is actually performing his official duties*." *Id.* at 939 (emphasis added). This is in direct conflict with the purpose behind asserting individual protected rights, particularly First Amendment free speech rights: Respondent has no personal stake in the speech she is uttering, and she cannot bootstrap official state speech into personal speech by virtue of the fact that government speech frequently relates to matters of public concern.

Just last term, this Court announced:

> [W]hen the State is the speaker, it may make content-based choices. ... [W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.... We recognize[] that when the government appropriates pubiic funds to promote a particular policy of its own it is entitled to say what it wishes.

Rosenberger v. Rectors and Visitors of the University of Virginia, 132 L. Ed. 2d at 718. This Court should resolve the issue of whether an individual's right to free expression under the First Amendment is properly exercised within the context of state, not citizen, speech.

C. This Court Should Clarify the Principle That "Speech of Public Concern" Relates to Content, Not the Medium of Expression

The Ninth Circuit misconstrued the "public concern" prong of the *Pickering* balancing test in arriving at its conclusion that respondent's speech constituted speech of public concern. The court concluded:

> The employee speech banned by Article XXVIII is unquestionably of public import. It pertains to the provision of governmental services and information. Unless that speech is delivered in a form that the intended recipients can comprehend, they are likely to be deprived of much needed data as well as of substantial public and private benefits. The speech at

> issue is speech that members of the public desire to hear.

Yniguez, 69 F.3d at 940. However, the desire of the public to receive information in a language they can understand is factually and conceptually distinct from this Court's prior pronouncements about speech of public concern. Respondent was hired to process insurance claim forms. While there is no doubt a public interest in insurance claims against the state as a general matter, and while the content of any particular claim is certainly of relative importance to the person who is filing such a claim, the actual content of any particular claim form processed by respondent does not amount to a matter of public concern in the context of First Amendment analysis. As a practical matter, the content of any such form may in fact be highly private in nature.

The Ninth Circuit attempts to blur the distinction between the medium used--the choice of language--and the message sought to be conveyed--meaningful content of the words. In so doing, the opinion effectively obliterates the public concern prong of the *Pickering* test, instead transforming the public concern about the functioning of government into the public's "right to receive" information from the government. *Yniguez*, 69 F.3d at 941.

Surprisingly, the Ninth Circuit relies heavily upon *United States v. National Treasury Employees Union* for this proposition. Quoting from *Treasury Employees*, the court states:

> "The large-scale disincentive to government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said."

> ... Thus, *National Treasury Employees Union* makes it clear that public employee speech doctrine weighs heavily the public's "right to receive information and ideas" by affording First Amendment protection to speech that the public has an interest in receiving.

Yniguez, 69 F.3d at 942 (citation omitted). But *Treasury Employees* does not declare that the public's desire to hear information elevates that desire, by itself, into an interest entitled to First Amendment protection. *Treasury Employees* dealt with a law banning honoraria for speeches given by government employees; as such, the Court presumed that certain members of the public were interested in hearing such speech because they were obviously willing to pay for it. But this Court in no sense found that the public interest in an employee's speech simply entitled that speech to First Amendment protection. Instead, this Court's holding that the ban was overinclusive was based on the finding that the ban reached matters that were *not government related*:

> Because the vast majority of the speech at issue in this case does not involve the subject matter of government employment and takes place outside the workplace, the Government is unable to justify [the ban] on the grounds ... asserted in *Pickering* ....

Treasury Employees, 130 L. Ed. 2d at 982. In other words, contrary to the Ninth Circuit's extrapolation of its reasoning, *Treasury Employees* implied that, had the ban applied to the subject of government employment or the government workplace (as it does in the present case), it would have been upheld regardless of the public's desire to hear the speech at issue.

This Court should grant certiorari to decide the question of whether the "public concern" prong of the public employee speech doctrine extends First Amendment protection beyond expressive content to the medium of expression used, purely on the basis that the public prefers an alternative medium.

D. This Court Should Determine Whether Arizona's Interest in Unity and Political Stability, as Promoted by Article XXVIII, Is Entitled to Deference by the Federal Judiciary

Under the *Pickering* test, this Court has traditionally balanced the interests of the public employee in expressing himself against the state's interest in "the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 817. The state interest asserted in the present case is not efficiency, but rather "protecting democracy by encouraging 'unity and political stability'; encouraging a common language; and protecting public confidence." *Yniguez*, 69 F.3d. at 944.

Initially the Ninth Circuit found that petitioners should "lose by default" under the traditional test, since the language restriction did not promote state interests in "efficiency and effectiveness." *Id.* at 943. However, the court did undertake to evaluate the asserted state interests in unity and political stability on the basis that other state interests *might* be legitimate bases for state regulation. *Id.*

While ostensibly giving credence to the state's asserted interest, the Ninth Circuit ultimately concluded "[w]e cannot agree that Article XXVIII is in any way a fair, effective, or appropriate means of promoting [the state's] interests." Unfortunately, its conclusion ultimately dealt less with the weight of the asserted state interest than in passing its own

judgment upon whether the state's interests were desirable and whether the means chosen by the state were the best for serving those interests. In support of its position, the Ninth Circuit cited *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Court in that case made it clear that a state law banning foreign language instruction in *private* schools to further the state's interest in "foster[ing] a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters" was arbitrary, and could not withstand *due process* scrutiny *as applied*. *Meyer*, 262 U.S. at 402-03. But the Court explained:

> The power of the state to ... make reasonable regulations for all schools, *including a requirement that they shall give instructions in English*, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum *for institutions which it supports*.

Id. at 402 (emphasis added). Contrary to the Ninth Circuit's reading of that case, this Court did not determine that language-ban laws were inherently arbitrary. Instead, it found that there was not a sufficient relationship between promoting American ideals and banning foreign languages to justify the state's intrusion into the private domain.

In the present case, it is difficult to imagine that the asserted state interest in "encouraging a common language" would not be well served by a statute making English the official language of the state. Moreover, Arizona's ban applies only to speech for which it pays. This Court should grant certiorari in order to decide whether Arizona is entitled to define and promote its own state interests in the manner it has chosen; a manner, moreover, which affects only the operation of its own state functions.

CONCLUSION

Article XXVIII was made part of the Constitution of the State of Arizona by a popular vote of the people of the state. It reflects their will that state officials and employees be united by a common language: English. To accommodate unanticipated situations in which the exclusive use of English would not always be appropriate, Article XXVIII also provides for the use of non-English languages under certain circumstances. The Ninth Circuit determined that it was not possible for the Article to be interpreted in such a way that it would pass First Amendment scrutiny, despite the fact that the Article contained terms unsettled by Arizona state law which would materially alter the federal constitutional question addressed by the court.

The majority of the Ninth Circuit clearly does not favor Article XXVIII's language restriction. However, its task as a federal court is not to pass upon the wisdom or desirability of Article XXVIII; rather, its responsibility is to determine whether the First Amendment entitles respondent and others similarly situated to ignore the dictates of Article XXVIII. While the court purportedly analyzed respondent's challenge on the basis of settled First Amendment law regarding public employee speech, it nevertheless departed from established First Amendment jurisprudence to craft a rationale to support its finding.

The majority acknowledged its departure from settled law in some telling passages of its opinion, stating in its conclusion that

> the diverse and multicultural character of our society is widely recognized as being among our greatest strengths. Recognizing this, we

> have not ... tried to compel immigrants to give up their native language; instead, we have encouraged them to learn English. The Arizona restriction on language provides no encouragement, however, only compulsion: as such, it is unconstitutional.

Yniguez, 69 F.3d at 948. However worthy cultural diversity is as a social value, this Court has never held that preservation of that diversity implicates First Amendment protections. Article XXVIII in no way restricts the political, intellectual, or social import of speech--the values which this Court has deemed central to First Amendment interests.

To establish the applicable standards by which public employee speech may be constitutionally regulated in the context of a foreign-language restriction, this Court should grant petitioner's writ of certiorari.

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Respectfully submitted,

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